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No. 83-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM M. CORRIGAN,
Petitioner,

vs.

MARY SUSAN GOODWIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a State Trial Judge when acting in his capacity as the Administrator of the Juvenile Court is absolutely or qualifiedly immune from damages, either actual or punitive, or can the Judge be held liable for acts of intentional sexual discrimination against an employee when said Judge acting as the Administrator for her employer transfers a female attorney from her position as a Hearing Officer to the Court to a position of Staff Attorney in the Court's Legal Department.

2. Whether the Court of Appeals erred or so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision in holding and concluding that Respondent presented sufficient evidence of intentional sexual discrimination against her with respect to employment so as to sustain a jury verdict holding Petitioner liable for punitive damages pursuant to 42 U.S.C. §1983.

PARTIES

The Petitioner herein is the Honorable William M. Corrigan. He was named as a party Defendant to the original proceeding both individually and in his official capacity as the then Judge of the St. Louis County Missouri Juvenile Court.

Respondent herein, Mary Sue Goodwin, an individual, was the Plaintiff in the original proceeding.

There are other parties to this suit who were named as Defendants in the original proceeding. Such parties are: St. Louis County, Missouri, a political subdivision; and the St. Louis County Circuit Court En Banc. The position of these additional parties is adverse to Respondent.

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STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition of Issues Presented by the Courts below

This is a suit for sex discrimination in employment. Respondent, Mary Sue Goodwin, an attorney brought suit in the United States District Court for the Eastern District of Missouri claiming that Petitioner in his capacity as the Administrator of the Juvenile Division of the Circuit Court of St. Louis County, Missouri had removed and transferred her from her position as Hearing Officer to the Court to a Staff Attorney position because of her sex. The Complaint was in two Counts. Count I was instituted pursuant to 42 U.S.C. §2000e *et seq.*, Title VII of

the Civil Rights Act of 1964. Count II was instituted pursuant to 42 U.S.C. §1983. Named as Defendants to both Counts were the Petitioner herein, Judge Corrigan who was the then Administrator and Judge of the Juvenile Division, and the entire Circuit Court, En Banc. The Circuit Court then filed a Third Party Petition naming as a Defendant to Count I, St. Louis County, the entity which paid Respondent's salary. Prior to trial, the District Court dismissed from Count II all Defendants except Judge Corrigan. Such is not an issue.

Trial was had on the two (2) Counts in the Complaint simultaneously. The §1983 Count was tried and submitted to the jury. The Title VII Count was tried and submitted to the Court without a jury. Following its deliberations, the jury returned a verdict on the §1983 Count in favor of Plaintiff-Respondent and against Petitioner. The jury awarded her nominal damages of One Dollar ($1.00) and punitive damages of One Thousand Dollars ($1,000.00). The District Court sitting without a jury then made and entered its Findings of Fact and Conclusions of Law on the Title VII Count. (Pet. A22-A29). The District Court granted Respondent declaratory relief and concluded that the Circuit Court, through Petitioner, had violated Title VII of the Civil Rights Act by transferring her from her position as Hearing Officer to Staff Attorney because of her sex. Injunctive relief was denied. The District Court further awarded Respondent attorney's fees and expenses against both Petitioner and the Circuit Court En Banc. The Court also entered Judgment in favor of the Circuit Court En Banc on its Third Party Petition against St. Louis County, Missouri. (Pet. A21-A31).

Petitioner and the other Defendants then appealed to the United States Court of Appeals for the Eighth Circuit. On March 6, 1984 the Court rendered its Opinion. (Pet. A1-A21). The Court of Appeals affirmed the Judgment against Petitioner on the §1983 Count. (Count II). On the Title VII Count (Count I) the Court vacated the Judgment against the St. Louis County

Circuit Court En Banc and against St. Louis County and remanded with directions to make new Findings on the issue of discrimination *vel non* in light of the Court's Opinion with respect to Respondent's burden of persuasion. The Court of Appeals then specifically retained jurisdiction of the appeal to review the new Findings of Fact from the District Court when received. The District Court has now made and certified to the Court of Appeals its additional and supplemental Findings of Fact and Conclusions of Law again holding in favor of Respondent. Petitioner did not include the same as part of his Petition. A copy is now attached and reproduced by Respondent as part of an Appendix to this Brief. (Appendix, infra, pp. A1-A4). To date, the Court of Appeals has not reviewed or made any determination as to the propriety of the District Court's new Findings of Fact and Conclusions of Law on the Title VII claim (Count I).

With respect to the two (2) issues raised by Petitioner herein, the Court of Appeals first held that he was not entitled to and not cloaked with immunity, either absolute or qualified, when he made the decision as the Administrator of the Juvenile Court to transfer Respondent from her position as a Hearing Officer to the Court's Legal Department as Staff Attorney. The Court of Appeals concluded that Petitioner's actions were not "an official judicial act" but rather constituted "an administrative personnel decision". (Pet. A16). Secondly, the Court of Appeals rejected Petitioner's argument as to sufficiency of the evidence. It concluded that Respondent had presented a *prima facie* case of intentional sexual discrimination by Petitioner so as to sustain the jury verdict against him for nominal damages of One Dollar ($1.00) and punitive damages of One Thousand Dollars ($1,000.00).

Statement of Evidence

Respondent, Mary Sue Goodwin, was first named as a Hearing Officer to the Juvenile Court in 1971 by its then Presiding

Judge, the Honorable Robert Hoester. She continued to serve as a Hearing Officer to the Juvenile Court during the tenure of the three (3) subsequent Juvenile Court Judges until March 1979 when Petitioner removed her from her position as Hearing Officer and transferred her to the Court's Legal Department as Staff Attorney serving a function similar to an Assistant Prosecuting Attorney. (Tr. 126). Petitioner directed Respondent's transfer two (2) months after the Circuit Court, En Banc, had named him as the Juvenile Judge for a term of one to two years.

Judge Hoester testified that, during his tenure as Juvenile Judge, he had had several occasions to observe Respondent's performance and the manner in which she conducted hearings. He testified "she did a fine job". (Tr. 29). The next Juvenile Judge, the Honorable Herbert Lasky who was Juvenile Judge of the Circuit Court from 1974 through 1975 also testified that, during his tenure, he had observed Respondent try cases, had conferred with her, and had reviewed various recommended findings and dispositions. (Tr. 69-70). He described and testified that Respondent was a "good lawyer" and "an excellent Hearing Officer". (Tr. 70). He never had and never heard any complaints about Respondent's performance either from lawyers or from other sources. (Tr. 70). Similarly, the Honorable Ninian Edwards who then served as Juvenile Judge from 1976 through 1978 also testified that he had personally observed Respondent perform her duties as Hearing Officer on numerous occasions. (Tr. 172). He too described Respondent as an "excellent" Hearing Officer who enjoyed a "good knowledge of the law". He further described her as a "rare combination of a good legal person together with a person who was deeply concerned about children". (Tr. 173). Like Judges Lasky and Hoester, Judge Edwards had never received any complaints or negative comments about Respondent's performance either from attorneys or otherwise. (Tr. 173-174).

Petitioner, William M. Corrigan, was then appointed by the Circuit Court, En Banc to be Judge of the Juvenile Division ef-

fective January 1, 1979. He agreed to assume this position as a result of several other Judges of the Circuit Court during the later part of 1978 approaching him and requesting that he take the position in an effort to restore the public's confidence following adverse publicity in the press. He was requested to take this position since he, like Judge Ninian Edwards, was a "strong" Judge. The term of Judge Edward's appointment as Juvenile Judge was expiring and there was a general policy of the Court, En Banc of not reappointing the same Judge beyond a two-three year term. Towards the later part of 1978 there were several articles and investigative stories in a local newspaper containing allegations about a detention worker at the Court molesting female juveniles while being held in detention. (Tr. 351-352). A subsequent investigation by the St. Louis County Grand Jury produced no indictments.

The evidence showed that Petitioner, shortly after assuming the duties of Juvenile Judge, decided to make various changes in the personnel of the Court and to institute changes in procedure as part of a general reorganization. Among the changes which Petitioner decided to make as the Administrator for the Juvenile Division was to decrease and ultimately eliminate if possible the number of Hearing Officers utilized. In this regard he obtained approval from the Court En Banc to fill a vacant position for "Commissioner". He then sought legislation, which if passed, would remove from the jurisdiction of the Juvenile Court authority to hear traffic cases of minors. If passed this would then permit elimination of all Hearing Officer positions. The General Assembly however did not approve such legislation for approximately one (1) year after the events which gave rise to the instant litigation.

At the time of the events in question, the Juvenile Court employed three (3) Hearing Officers. One who was not an actually licensed attorney voluntarily agreed to step down and so advised Petitioner. This left Respondent and one Craig Donis, a male, who had been a Hearing Officer for approximately two

(2) years. Petitioner as part of his reorganization then determined that one of these two remaining positions as Hearing Officer should be eliminated immediately and the individual transferred to the Court's Legal Department as a Staff Attorney to serve a function similar to an Assistant Prosecuting Attorney. Both Respondent and Donis were qualified for the position as Staff Attorney. There was evidence that one Corinne Richardson, who headed the Legal Department, preferred that Craig Donis be transferred to his former position in her department since he had previous experience with her as a trial attorney. (Tr. 304-305).

Respondent adduced evidence to the effect that on Thursday, March 1, 1979, approximately three (3) days before making his decision as to who he would transfer into the Legal Department as a Staff Attorney and who he would retain as a Hearing Officer, that Petitioner walked into the office of Commissioner Branom and stated words to the effect: "this Court won't run smoothly until we get rid of these God-damn women". (Tr. 94). This testimony was confirmed by other witnesses. (Tr. 84, 283). (See Appendix, infra, pp. A6 - A8). Petitioner testified that he could not remember making such remark but he could not deny having done so. (Tr. 424).

Evidence was further adduced that shortly after assuming the position as Juvenile Judge Petitioner had established an "Executive Committee" of sorts to assist him in the general administration and running of the Court. The Juvenile Division employed some two hundred forty-eight (248) persons. (Tr. 382). There was repeated testimony from Petitioner that the Court needed to be run more as a business with a Chief Officer, Division heads and an Advisory Board of Directors. (Tr. 382-385). This Executive Committee conducted Wednesday morning briefings to review various problems and make recommendations to improve the administration of the Court. The evidence further showed that Craig Donis had been invited and attended several of the Wednesday morning briefings. Respondent, on the other hand, was neither invited and never attended.

The evidence further showed, that on Friday the day following Petitioner's remark concerning the employment of women by the Court to Commissioner Branom, this Executive Committee consisting of Commissioner Branom and other department heads met with Petitioner to review and make recommendations between Goodwin and Donis as to who should be transferred to the Legal Department and who should be retained as Hearing Officer. Two individuals recommended to Petitioner that Goodwin be retained as Hearing Officer and two recommended that Donis should be retained. (Tr. 271-272). Petitioner testified he had the ultimate responsibility and the power to veto any recommendations. (Tr. 411). Petitioner then on Monday morning announced a decision to transfer Respondent to the Legal Department and to retain Donis as the Hearing Officer. (Tr. 307). Before announcing his decision, Petitioner, as a courtesy, advised certain other Judges of the Circuit Court of his decision. There was further evidence that Petitioner at or near the time he made his decision to transfer Respondent also made statements to the effect that he considered the Hearing Officer's position to be more important than the position of Staff Attorney. (Tr. 306, 315).

The record evidence showed that Craig Donis had been a Hearing Officer to the Court for only two (2) years. Previous to that he had served as Assistant Supervisor to the Court's Legal Department. Donis had had substantial experience in the prosecutorial job to which Goodwin was transferred. (Tr. 305). Respondent had none. (Tr. 304).

Petitioner explained and testified that he had made the decision to transfer Respondent to the position as Staff Attorney rather than Craig Donis because Craig was the more qualified Hearing Officer and he had received no complaints about his performance while on the other hand he had received complaints about Respondent's ability and whether she was properly preserving the constitutional rights of the juveniles. (Tr. 166-169). Robert Ruhland, who served as an Administrator to

the entire Court En Banc testified that he had received complaints from two to three lawyers, including one Dunley Dunlop, to the effect that Respondent tended to disregard the rules of evidence. (Tr. 229-230). Other than the testimony from Mr. Dunlop to the effect that he felt that Respondent approached her duties more as a social worker than in a judicial manner, Petitioner adduced no other testimony to substantiate the purported complaints he had received from several lawyers as to Respondent's performance. (Tr. 363). Petitioner named several specific attorneys who allegedly voiced complaints to him about Respondent's performance. One of these attorneys was James Hartenbach. (Tr. 435-436). Hartenbach was called as rebuttal witness by Respondent. Hartenbach testified that he had never appeared before Respondent when she served as a Hearing Officer. He further testified that he had never made any statement to Petitioner to the effect that she was not competently performing her duties. (Tr. 455-456). None of the other lawyers who allegedly voiced complaints were called as witnesses.

There was further evidence in the record that before making his decision on transferring Respondent that Petitioner had never observed her performance in the Courtroom. (Tr. 435). Nor had he reviewed her personnel file. (Tr. 440). He had never reviewed or discussed her performance with the previous Juvenile Judges, Judge Hoester, Judge Lasky, or Judge Edwards. (Tr. 31, 72, 178).

Respondent further adduced evidence to the effect that Petitioner had made other provocative remarks about women at the Juvenile Court. Commissioner Branom testified that Petitioner "delighted" in making provocative or what could be described as sexist remarks to Branom's secretary, Holly Jaeger. (Tr. 267). Commissioner Branom described such remarks as "zaps" and indicated that Petitioner would make such provocative remarks at least once a day or at least once every other day. (Tr. 284). Jaeger's reaction to such provocative remarks was to

become visibly upset and to grit and gnash her teeth. (Tr. 269, 284). She did not laugh or consider it humorous and complained to her supervisor, Commissioner Branom. (Tr. 284). Branom in response simply tried to explain that it was Petitioner's manner of being humorous. (Tr. 286). Petitioner also adduced evidence to the effect that he had a "needling" personality and that it was his manner of being humorous. (Tr. 266-267, 424-425). In Petitioner's words "it was in my judgment to help relax people". (Tr. 447).

Respondent adduced evidence to the effect that shortly after the commencement of this suit there was a meeting between the Judges of the Circuit Court, En Banc to discuss the litigation and which attorneys should be hired to represent Petitioner individually and to represent the Court En Banc. During this meeting Judge Hoester testified that Petitioner stated to him that the litigation was all Judge Hoester's fault because he (Hoester) "had taken her [Goodwin] out of the kitchen, taken her apron off and put a robe on her". (Tr. 57, Appendix infra. p. A5). Petitioner testified that when he made such remark he was only joking. (Tr. 432). On the other hand, Judge Hoester testified that although the meetings of the Court En Banc would frequently be marked with good humor he was unaware as to whether Petitioner was "in jest" when he made such statement. He did not know his state of mind. (Tr. 56-57, 59).

Respondent testified that she found her job as Hearing Officer challenging and professionally satisfying. She did not find the position as Staff Attorney to be anywhere near as satisfying or responsible. (Tr. 127). She enjoyed presiding at the hearings, taking testimony, and making recommended findings and decisions. (Tr. 111, 149). Respondent during her tenure as a Hearing Officer to the Court had served as Chairperson to the Missouri Bar Juvenile Law Committee. She was also a member of the National Council of Juvenile and Family Court Judges. (Tr. 107-108). Similarly, Judge Edwards testified that Respon-

dent's position as a Hearing Officer to the Court was one of "great dignity". (Tr. 180). In his opinion the Hearing Officer position was "far more helpful" and desirable careerwise than was the Assistant Prosecuting Attorney position to which she was transferred. (Tr. 193-194). Petitioner expressed contrary testimony to the effect that in his opinion he felt that serving as a trial attorney as an adversary was a far more respected position than a Hearing Officer to the Juvenile Court and would more likely benefit her legal career. (Tr. 421-422).

As noted previously, there was further testimony from Petitioner describing his role and function as a Juvenile Judge to the Court. He drew a distinction between making judicial decisions and serving as an Administrator. He testified that as the Administrator to the Juvenile Court he attempted to place it more on a "corporate structure" and to administer it as if he were "running a business" which had to be responsive and accountable to the public. (Tr. 382-385, 453-454). Petitioner testified and expressed his opinion that it would be inappropriate for he or any other Judge to consult and to obtain input from others in making a quote unquote "judicial decision". Petitioner, however, did not believe that it would be inappropriate for he or another Judge to consult and obtain input from others with respect to the various administrative decisions which had to be made concerning the running and functioning of the Juvenile Court. (Tr. 453-454). He acknowledged that his decision to transfer Respondent was a "personnel action" which was part of the ongoing reorganization, transfer, demotion, and termination of employees. (Tr. 449-450).

ARGUMENT IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

I

Contrary To Petitioner's Argument, The Opinion By The Circuit Court Of Appeals Does Not Conflict With The Holdings Of Either This Court Or With The Missouri Supreme Court With Respect To Judicial Immunity In That Petitioner In Making The Decision To Transfer Respondent From Her Position As Hearing Officer To A Staff Attorney Was Not Exercising A Judicial Function But Was Rather Exercising An Administrative Function Acting For Her Employer. The Doctrine Of Judicial Immunity Applies Not To The Character Of The Actor But To The Nature And Character Of The Act Performed.

Petitioner contends that this Court should grant the Writ of Certiorari since the decision of the Eighth Circuit Court of Appeals totally conflicts with prior decisions of this Court and abrogates the doctrine of judicial immunity from damages, either absolute or qualified. Not so. The acts in question simply were not judicial acts but rather administrative acts made by Petitioner in his capacity as an employer and supervisor.

Respondent acknowledges that State Court Judges enjoy absolute immunity from liability for damages for judicial acts performed by them. *Pierson v. Ray,* 435 U.S. 349, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Such absolute immunity extends even to cases where the Judge is acting in excess of his jurisdiction so long as the act performed is a judicial act. *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Thus, the crucial question to be determined in the instant case is whether Petitioner's actions in transferring Respondent to a position as Staff Attorney from her position as Hearing Officer was a "judicial" or an administrative act even though performed in his official capacity. The Circuit Coiurt of Appeals and the District Court both concluded that Petitioner's actions were not

"judicial" in nature but rather an "administrative personnel decision". (See, Pet. p. A16). Such Finding and Conclusion by the lower Courts is neither clearly erroneous nor contrary to the decisions of this Court.

The doctrine of absolute judicial immunity extends only to judicial acts. This Court both in *Stump v. Sparkman, supra,* and *Gravel v. United States,* 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) has expressly recognized that it is the character of the act and not the title of the actor which is important in determining the nature and extent of immunity. Thus in *Gravel* this Court stated:

> "But the Clause [Article I, §6] has not been extended beyond the legislative sphere. *That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature.* Members of Congress are constantly in touch with the Executive branch of the government and with administrative agencies—they may cajole, and exort with respect to administration of a federal statute—but such conduct, though generally done, is not protective legislative activity." (408 U.S. at 625). (Emphasis supplied).

Similarly, this Court by its repeated references in *Stump* to immunity for "judicial acts" also recognized that Judges, like legislators, are from time to time called upon to perform various acts and functions which although official in nature are not "judicial acts". This Court also reversed the Seventh Circuit on the grounds that said Court had adopted "an unduly restrictive view" of the scope of the State Trial Judge's jurisdiction—not on the grounds that Judges are immune from all acts, even non-judicial. Thus, this Court stated in part:

> "The relevant cases demonstrate that the factors determining *whether an act by a Judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and the expectations of*

> *the parties, i.e., whether they dealt with the judge in his official capacity.* Here both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act....We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval. *Because Judge Stump performed the type of act normally performed only by judges and* because he did so in his capacity as a Circuit Judge, we find no merit to Respondent's argument that the informality with which he proceeded rendered his action non-judicial and deprived him of his absolute immunity." (435 U.S. at 362). (Emphasis supplied).

Similarly, lower Federal Courts have also recognized that Judges may perform various acts and functions although in their official capacity which are not "judicial acts" entitled to immunity. In *Doe v. County of Lake,* 399 F.Supp. 553, 556 (N.D. Indiana 1975), the Court stated that the doctrine of judicial immunity does not "immunize every State Court Judge in every law suit". See also, *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966), cert. den'd 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967); and *Marajino v. Circuit Court St. Louis County,* 537 F.Supp. 206, 211 (E.D. Mo. 1982), aff'd 707 F.2d 1005 (8th Cir. 1983).

The record clearly reveals that Petitioner's decision in the instant case to transfer Respondent to a position as Staff Attorney to the Court simply was not a judicial act. Petitioner conspicuously ignores and fails to point out to this Court his own testimony in which he so acknowledged. On direct examination he made several references to attempting to establish the Juvenile Court and to run it as a business similar to a corporation with a Board of Directors with himself serving as the Chief Administrative Officer. Then following the conclusion of cross-examination the following question was propounded by Judge Cahill from the bench and Petitioner responded:

"THE COURT: All right.

Judge, I have one area that I would like to clarify. I believe that I know the answer and—but I think for the purpose of making sure the jury understands, would you please explain the role between your judicial functions and your functions as administrator and whether or not the judicial functions that a Judge performs require him to consult with, confer or ask approval of other Judges.

JUDGE CORRIGAN: Well, the judicial function—it would be a violation of our judicial ethics if I conferred with other Judges on how to make a decision. Judicially I think it would be totally inappropriate.

With regard to the Juvenile Court, it is the only Court I know where the Judge carries a full docket of—full judicial responsibility and at the same time carries this tremendous administrative responsibility and as an administrator, of course, I think the Judge can seek the advice of people...." (Tr. 453-454).

The foregoing clearly demonstrates that both Petitioner and the District Court acknowledged and recognized the test enunciated by this Court in *Stump*. Was the act performed a judicial act one normally performed only by Judges. No.

Throughout this country various managers and supervisors of corporations and other businesses when acting as an employer repeatedly must make personnel decsions and determine which employee to transfer and to retain in one position or another. Simply because such act in the instant case was made by a Judge does not *ipso facto* become a judicial act. Petitioner's argument to the contrary simply places form over substance. Petitioner would read *Stump* and the other decisions of this Court to hold that a Judge acting as an employer cannot be held liable for intentional discrimination but that other employers can. The inequality of such contention is self evident.

Petitioner then contends that the Missouri Supreme Court in *Pogue v. Swink*, 284 S.W.2d 868 (Mo. Banc 1955) recognized and held that a decision by a State Circuit Judge as to the tenure and salary to be paid to a Court employee constitutes a "judicial act" and is entitled to immunity. Not so. Respondent respectfully suggests that Petitioner has misread and misapplied the decision by the Missouri Supreme Court. Petitioner's quotation from the Opinion is simply taken out of context.

In *Pogue* a Circuit Judge by Order entered of record modified and increased the salary which was to be paid by St. Francois County to a Deputy Clerk. The Judge then sent a certified copy of the Order to the County Administrative body. Upon a refusal by the County officials to approve or to pay the increase in the Deputy Clerk's salary, the Circuit Judge then had issued and served upon the County officials an Order to Show Cause why they should not be adjudged in Contempt. The Judge then conducted an evidentiary hearing on the Contempt citation and following a continued refusal of the County officials to pay the increase in salary he ordered their confinement. Following their discharge by Order from the Missouri Court of Appeals in St. Louis in Habeas Corpus, the County Administrative officials then filed suit against the Circuit Judge seeking damages against him for "False Imprisonment and Trespass".

The decision by the Supreme Court in *Pogue* dealt with the propriety of the Circuit Court's dismissal with prejudice of this damage petition. In *Pogue*, the Missouri Supreme Court concluded that the Circuit Judge was immune from damages in that his action in both citing the County officials for Contempt and following an evidentiary hearing adjudging them to be in Contempt constituted a judicial act. It was for this judicial act, the Contempt proceeding, upon which the Missouri Supreme Court determined that a Circuit Judge was entitled to immunity. Nowhere did the Missouri Supreme Court hold or determine that the simple act of setting a salary for a Court official constituted a judicial act entitled to immunity in and of itself. Thus, the Missouri Supreme Court stated:

> "It would seem, as a practical matter, that the thing or action that injured the Appellants and of which they really complained is not the Judge's raising the Deputy's salary and ordering it paid but rather his sentencing them to jail for contempt." (L.C. 871).

Petitioner's quotations from *Pogue,* that a Court of general jurisdiction has the inherent authority to appoint attendants and clerks and to set their salaries is simply taken out of context. Such quotation does not support Petitioner's contention that the appointment or removal of such employee constitutes the "exercise of judicial discretion" entitled to judicial immunity. Nowhere, as in *Pogue,* is Respondent contending that Petitioner did not have the inherent authority to reorganize the Juvenile Court. Nowhere as in *Pogue,* is Respondent contending that Petitioner did not have the inherent authority to reduce the number of Hearing Officers or to transfer her. Such is the power vested in a Judge to administer his Court similar to the power a President of a corporation has. The doctrine of inherent authority was simply established to enable a Court to function and to survive even absent statutory authority or appropriation governing the hiring and firing of personnel and setting their salaries.

But a simple exercise of inherent authority to preserve the functioning of a Court does not automatically, however, translate or make an administrative decision implementing such power "judicial" in character. It does not confer absolute or qualified immunity for an intentional act of discrimination simply on the basis of the employee's sex.

To accord Judges absolute immunity for employment decisions made by them but to permit liability against other public officials for their employment decisions would constitute a denial of equal protection. It would place Respondent, as an employee, in a different classification from other public employees. It would permit Judges, but not other employers, to violate employee's civil rights and to intentionally discriminate

against employees on the basis of their race, religion, national origin, and sex with impunity. The facts of this case simply do not merit the exercise of this Court's discretion to grant Certiorari simply to review the record to determine that Petitioner's actions were not judicial in nature but rather as described by the Court of Appeals an "administrative personnel decision".

Alternatively, Petitioner suggests that this Court should grant Certiorari to determine whether the Court of Appeals erred in failing to at least accord him qualified immunity. But under the facts of this case acts of intentional sexual discrimination in employment do not entitle Petitioner to even a qualified or "good faith" immunity. Both the District Court and the Court of Appeals properly so held.

The jury, in order to return its verdict on the 1983 Count against Petitioner, had to find as a fact that he *intentionally* discriminated against Respondent because of her sex. This Court must contrast such finding of intentional discrimination with the standard of disparate impact which governs Title VII proceedings. See, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 N. 15, 97 S.Ct. 1843, 1854 N. 15, 52 L.Ed.2d 396 (1977). Such finding by the jury of an intentional act of discrimination based upon sex *ipso facto* eliminates any argument that Petitioner either objectively or subjectively acted in good faith if a reasonable person knew or should have known that an employment decision constituting an intentional act of sexual discrimination violates a person's basic and unquestioned constitutional and civil right.

Contrary to Petitioner's argument, this Court's decision in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) supports, and is not contrary to the determination by the Circuit Court that Petitioner is not entitled to a "good faith" or qualified immunity. This Court in *Harlow* simply recognized that qualified or good faith immunity has both "objective" and "subjective" aspects.

To minimize the adverse consequences and the expense of subjecting public officials to damage suits if such public official was entitled to good faith immunity, this Court enunciated procedures to be followed to reduce such adverse consequences. Federal District Courts and Courts of Appeals were empowered to determine through various pre-trial motions, such as Motions for Judgment on the Pleadings and/or Motions for Summary Judgment, to determine the "objective" aspect of whether the public official is entitled to the good faith or qualified immunity. This "objective" test as opposed to the "subjective" inquiry focuses on whether the challenged conduct violates a person's clearly established statutory or constitutional civil rights which a reasonable person knew or should have known were clearly established at the time the action occurred. Thus if at the time the action occurred, the law was not settled or clearly established a public official "could not reasonably be expected to anticipate subsequent legal developments". See, *Harlow, supra,* 457 U.S. at 818, 73 L.Ed.2d at 410. Also see, *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). This Court directed that such "objective" determination and threshold immunity question should be determined prior to broad and far reaching discovery taking place. As this Court articulated such procedure would protect the societal interest of having its public officials not subjected to time consuming and vexacious discovery if the constitutional or statutory rights in issue were not clearly and well settled prior to the occurrence of the challenged acts. Likewise it would also serve and protect the public interest of detering unlawful conduct and providing compensation for victims if the constitutional or statutory rights were clearly settled and established law prior to the occurrence of the challenged acts.

On the other hand, however, this Court also recognized in *Harlow, supra,* that the "subjective" aspect in determining whether a qualified or "good faith" immunity is applicable frequently cannot be resolved by pre-trial motions for summary judgment. See, Footnotes #26 and #27.

The record clearly reveals that both the District Court and the Court of Appeals in the instant case applied the two-pronged analysis enunciated by this Court in *Harlow*. First, in considering and applying the objective aspect of "good faith" or qualified immunity, there can be no question but that Respondent's civil rights as an employee to be free from sexual discrimination by her employer was well settled both statutorily and constitutionally prior to the occurrence of the events in question. Congress in 1964 enacted Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.* which expressly prohibited an employer from discriminating against an employee on the terms and conditions of employment on the basis of among others - sex. No reasonable man therefore, much less a State Judge sworn to uphold both the constitution and laws of the United States, can have had any doubt that sexual discrimination with respect to employment was a prohibited act. But the subjective aspect of whether Petitioner was acting in good faith could not be determined prior to trial since it involved resolution of "factual questions" including a determination as to his state of mind. Petitioner challenged the reliance by District Court and the Court of Appeals on the jury's resolution of this factual question as vesting in a jury the power to determine both the sufficiency of the evidence and whether a good faith defense is appropriate. Such contention and argument simply is without merit.

As Petitioner correctly noted it is a question of law whether a Plaintiff presented a *prima facie* case and whether a good faith defense is appropriate. Similarly, under out system of justice it is the prerogative of a jury, not a Court once the sufficiency of the evidence has been determined to adjudicate and resolve disputed "factual questions". Such power in fact is expressly guaranteed and reserved by the Seventh Amendment to the United States Constitution. The District Court and the Court of Appeals retained at all times the jurisdiction and the right to determine the legal issues of whether Plaintiff presented a *prima facie* case of discrimination and whether Defendant, as a matter

of law, proceeded with the requisite good faith. Such determinations can be made by the District Court upon motion at the close of Plaintiff's case, at the close of all evidence, and again by Motion for Judgment Notwithstanding the Verdict. Once such legal issues have been resolved, however, it is for the jury, not the Court to determine the disputed factual issues of whether Petitioner intentionally discriminated against Respondent because of her sex.

Thus, it was for the District Court and the Court of Appeals on review to determine whether as a matter of law Plaintiff presented sufficient evidence of intentional sexual discrimination so as to permit the factual issues to go to the jury. It was thus for the jury to determine the facts and to believe or disbelieve Petitioner's contentions throughout trial that his remarks and comments about "God-damn women" and removing the "apron strings" from women were made in jest as he contended or were evidence as Respondent contended of a subjective bias and intent to discriminate against women in holding positions of employment with the Court. As this Court noted in *Harlow,* citing from *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 443 L.Ed.2d 214 (1975):

> "...qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the Plaintiff, or if he took the action *with the malicious intention* to cause a depravation of constitutional rights or other injury...." (Court's emphasis).
>
> (420 U.S. at 322).

Here the District Court followed the two-prong inquiry of *Harlow.* It determined prior to trial that the "objective" aspect of immunity was not present. The Court could not resolve by summary judgment the "subjective" aspects of immunity and submitted, once a *prima facie* case was made the disputed fac-

tual issues of intent to the jury. This procedure served and balanced the conflicting and competing societal interests recognized in *Harlow*.

Given the limited resources of this Court and in accordance with Rule 17 of this Court this case simply does not present either the factual or legal circumstances so as to necessitate the exercise of this Court's supervisory jurisdiction for it to independently sift through and review the record. Both the lower Courts who are more familiar with the entire record have already made the determination that in this case Petitioner, as a matter of law, did not have the requisite "good faith". The Court of Appeals applied the correct standard with respect to Petitioner's alternative claim to a qualified innumity. Certiorari should be denied.

II

Certiorari Should Not Be Granted Merely For This Court To Independently Review The Record To Determine And Assess Whether Respondent Presented A Prima Facie Case Of Intentional Sexual Discrimination By Petitioner Pursuant To 42 U.S.C. §1983 So As To Support The Jury's Verdict.

In Point II of his Petition, Petitioner respectfully suggests that Certiorari should be granted so that this Court may independently sift through and review the record to determine whether Respondent submitted sufficient evidence as a matter of law. Such issue, however, has already been passed upon by both the District Court and by the Court of Appeals who are thoroughly conversant with the record established. The District Court also had the opportunity in assessing the sufficiency of the evidence to observe the credibility and demeanor of the witnesses. This case simply does not present the requisite circumstances so as to require an exercise by this Court of its power of supervision.

Rule 17 of this Court sets forth certain criteria generally followed in determining whether or not Certiorari should be granted. It clearly is not a matter of right. As noted previously, this Court does not grant Certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric.* 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849 (1938), adhered to 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 116, Reh den'd 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355; and *NLRB v. Pittsburgh SS Co.,* 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951). Rule 17 is not couched or phrased in terms of reviewing a record to determine whether a lower Court erred in its determination of the factual issues or the sufficiency of the evidence. Rather, it is couched and phrased in terms of the decision of the Court of Appeals being in conflict with another decision of the Court of Appeals departing from accepted and usual course of judicial proceedings or sanctioning such a departure by a lower Court so as to require an exercise of this Court's supervisory power.

Petitioner's statement of the case and facts as set out in his Brief is woefully inadequate to describe the evidence presented and the legitimate inferences therefrom could be drawn by both the jury and by the Court. On page 9 of his Petition, Petitioner seeks to minimize and negate the two (2) sexist and extremely disparaging remarks which he made concerning women. One remark was made within three days preceding his decision. The second remark was made during the course of a meeting by the Court En Banc to discuss the instant litigation. Petitioner informed and told another Judge that it was all his fault because he removed Respondent from the kitchen, removed her apron strings and put robes on her. Peitioner would lead this Court to believe that such comments were simply made in jest and were part of his humor and that the evidence in this regard is uncontested. Not so. Petitioner could not even recall making the first remark but did not deny doing so. (Tr. 424). If intended in jest, it was not so interpreted by the recipient to whom it was directed and jesting with Holly Jaeger. She on the other hand

was described during the trial as gritting her teeth and restraining herself. Commissioner Bramon acknowledged that she was extremely upset. When she complained to him he simply counseled her that it was Petitioner's mannerism.

This case presented the classic jury issue. It was for the jury to decide the demeanor and credibility of the witness. It was for the jury to determine whether Petitioner was in fact jesting or whether Petitioner harbored a bias and discriminated against women. The jury was free to disregard and to disbelieve Petitioner's explanations during trial. Petitioner had already acknowledged that he had not consulted with the three (3) Judges who had been Respondent's supervisors immediately preceding. Petitioner had not personally observed Respondent's performance. Petitioner had not reviewed Respondent's personnel file. With regard to the purported complaints he had received from attorneys. One attorney specifically named as complaining denied ever making such a remark. He testified in fact that he had never tried or presented a case in front of Respondent as Hearing Officer.

In short, this case simply does not present the requisite important public issue as distinguished from the party so as to necessitate review by this Court.

CONCLUSION

Petitioner obviously is dissatisfied with the jury's verdict and the Opinion from the Court of Appeals holding that he was neither entitled to absolute immunity or qualified immunity for his decision to transfer and demote Respondent from a Hearing Officer position to a Staff Attorney position. But as shown, the Court of Appeals decision does not conflict with prior holdings relative to judicial immunity. Nor does this case present the requisite public importance so as to necessitate an independent review and sifting by this Court of the record to determine whether sufficient evidence of intentional sexual discrimination was presented as a matter of law. Such review has already been conducted by two (2) lower Federal Courts and have been ruled adversely to Petitioner. Certiorari should accordingly be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 80-1340-C (4)

Mary Susan Goodwin,
Plaintiff,

v.

The Circuit Court of St. Louis County,
and William M. Corrigan,
Defendants.

ORDER

(Filed May 22, 1984)

This matter is before the Court on remand from the Eighth Circuit. In accordance with the Eighth Circuit opinion, this Court hereby enters its supplementary findings of fact and conclusions of law.

Supplementary Findings of Fact

1. Judge Corrigan's stated reason for transferring plaintiff Goodwin was because she was the weaker of the two hearing officers. Tr. at 416. Corrigan claimed Goodwin was inferior for two reasons: (1) Her legal ability, and (2) her conducting hearings in the manner of a social worker. Tr. at 414-16.

2. The three juvenile judges preceding defendant Corrigan all praised Goodwin's performance and legal ability. Judge Hoester "thought she did a very fine job." Tr. at 29. Judge Lasky stated she was "a good lawyer" and "an excellent hearing officer." Tr. at 70. He stated he had received no com-

plaints about Goodwin. Tr. at 70. Judge Edwards stated she was "excellent" and had a "good knowledge of law." Tr. at 173. He also stated that he had received no complaints about Goodwin. Tr. at 174.

3. Judge Corrigan received complaints about Goodwin and apparently made no effort to investigate these complaints. Tr. at 414-16, 435-36, 440, 448, 450-51.

4. On Thursday, March 1, 1979, in the presence of Gary Guleff, James Bilhorn, Robert Branom, and Carol (Holly) Jaeger, Judge Corrigan made a statement to the effect that things were not going to run smoothly until the court got rid of all the damned women. Tr. at 84, 94, 269. Ms. Jaeger was apparently upset by this remark. Tr. at 269. Judge Corrigan routinely made such allegedly humorous, sexist remarks to Miss Jaeger. Tr. at 284-86.

5. On Monday, March 5, 1979, Judge Corrigan informed Miss Goodwin of her transfer to the Legal Department. Tr. at 123-125.

Supplementary Conclusions of Law

By judgment and order of December 30, 1982, this Court held that the transfer of Mary Susan Goodwin by the Circuit Court acting through Judge Corrigan, violated Title VII of the Civil Rights Act of 1964. *Goodwin v. Circuit Court of St. Louis County,* 555 F. Supp. 658 (E.D.Mo. 1982). This Court's opinion stated:

> After Goodwin's prima facie case is established, the burden shifts to the Circuit Court to show a non-discriminatory purpose for the selection of Donis over Goodwin or that Goodwin was not treated differently from the other persons available for the hearing officer position.

555 F. Supp. at 662. The Court inadvertently failed to state that it is the burden of production that shifts to the defendant after the plaintiff has made a prima facie case.

1. As the Eighth Circuit points out, the Court must apply a three-part analysis in assessing the evidence in a Title VII action. After the plaintiff has established a prima facie case by the preponderance of the evidence, the burden of production shifts to the defendant to articulate some legitimate, non-discriminatory reason for its act. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination. *Id.* Although the burden of production shifts after the plaintiff has made a prima facie case, the burden of persuasion on the issue of discrimination remains on the plaintiff at all times.

2. Judge Corrigan articulated a legitimate, non-discriminatory reason for his action. He stated that he made the decision to transfer Goodwin based on complaints he received about her. Further, Judge Corrigan claimed Goodwin's legal ability was inferior and that she conducted hearings in the manner of a social worker.

3. Goodwin, however, showed by a preponderance of the evidence that these reasons were pretextual. The evidence shows Judge Corrigan made no effort to investigate the complaints that he claims led to Goodwin's being transferred. This lack of investigation tends to show a bias against Goodwin resulting in Judge Corrigan's accepting without verification the complaints made. Also, contrary to Judge Corrigan's evaluation, the three prior juvenile judges praised Goodwin's performance and legal abilities. Finally, Judge Corrigan made two sexually derogatory statements regarding women in the courts and made repeated sexist remarks to Holly Jaeger.

Accordingly, this Court, using the three-step allocation of burdens and order of presentation of proof required by *Texas Dept. of Community Affairs v. Burdine,* finds that a discriminatory reason played an impermissible role in the decision to transfer Goodwin.

SO ORDERED.

Dated this 22nd day of May, 1984.

/s/ Clyde S. Cahill
United States District Judge

APPENDIX B

Portions of trial transcript

Hoester-Direct

[57]the east end of the table so it was down to the right of the door as you come in.

Q. And

A. Judge Corrigan was across the table from me.

Q. And the topic of discussion was the suit that Sue Goodwin had filed?

A. Yes.

Q. Can you tell the jury what Judge Corrigan said to you about that suit?

A. He said it was all my fault, that I had taken her out of the kitchen, taken her apron off and put a robe on her.

MR. NEWMAN: I have nothing further.

CROSS EXAMINATION

BY MR. PADBERG:

Q. Judge Hoester, how long have you known Judge Corrigan?

A. Well, I guess fifteen, twenty years.

Q. Okay. And would you describe his sense of humor as a needler or wry or for instance when he sees me he tells me

A. I think he has a good sense of humor. There isn't any question about it.

Q. He's always needling someone or another; isn't he?

A. That's true.

Q. As a matter of fact in a Court en banc meeting he's not the only one, there's a lot of judges who banter back and forth with humor; isn't that so?

* * * * *

Bilhorn-Direct

[84] A. I believe so.

Q. Prior to — prior to telling us what Judge Corrigan said at that time, can you describe him as he walked into the area where he worked?

Anything about his gestures, his mannerisms?

A. He walked in fairly rapidly past me and stopped in the doorway to Mr. Branom's office with his hand on the doorknob, the door was standing open—

Q. He was laying on the doorknob?

A. I don't know that he was placing any weight on it.

Q. Holding—

A. He had his hand on the doorknob.

Q. Did you notice any gestures of his head or the other arm?

A. Not prior to any remark he made.

Q. What was the remark — the first remark that he made?

A. As nearly as I can recall he said, "this Court will never run well so long as there are women in charge."

Q. After that statement was made, what did you do?

A. Nearly as I can recall I left the office and went back to my own office.

Q. You said anything?

A. No, sir.

Q. At a later time did you discuss that statement with Sue Goodwin?

* * * * *

Guleff-Direct

[94] Q. And at about that time Judge Corrigan approached that area, did he not?

A. Yes.

Q. Can you describe — describe how he approached the room, the doorway.

A. Well, Judge Corrigan walked into the doorway, grabbed ahold of the doorknob, bowed his head, shaking it from side to side and —

Q. And he was shaking his head from side to side. Did he then look up?

A. I believe he did, yes.

Q. Was he looking toward the area where you were in the office?

A. Yes, he was.

Q. And what did he say?

A. "This Court won't run smoothly until we get rid of these God-damn women."

Q. And what did you say?

A. Nothing.

Q. Did anyone speak after that statement was made?

A. Oh, I'm sure someone did, yes.

Q. Do you recall what was said?

A. No, I don't.

Q. The Monday following that statement Sue Goodwin was transferred to the legal department. Did you later find that . . .

* * * * *

Branom-Cross

[283] used as — for a frame of reference?

A. Not to my recollection.

Q. Did you say that on the date that Judge Corrigan made the statement about women, damn women — is that how you related it? Damn women, not God-damned, but damn?

A. I don't think he said "God", no.

Q. On that date where was Holly Jaeger?

A. Seated at her desk.

Q. She was seated at her desk. How far —

A. Yes, sir.

Q. How far was that from where you were seated?

A. I was standing.

Q. Where were you standing?

A. Behind and to one side of her.

Q. So —

A. To her left.

Q. So you were not in your office?

A. No.

Q. Mr. Guleff was standing where?

A. In the doorway between my offices and Holly's office.

Q. And where was Mr. Bilhorn standing?

A. To the right — to my right of the doorway from Mrs. Jaeger's office to the hallway.

Q. What was the distance between them — all of you from the furthest person to the last person?

* * * * *